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IN THE

Supreme Court of the United States

October Term, 1966

No. 1065

MICHAEL MYERSON, a/k/a MEYER MYERSOHN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, New York.

MORTON L. GINSBERG,
Of Counsel.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Michael Myerson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 16, 1966.

A. The Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit in this case has been reported in 368 F. 2d 393 (1966), and is set forth in Appendix A to this Petition.

B. Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 16, 1966, affirming the judgment of conviction of the United States District Court for the Southern District of New York, entered December 22, 1965. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code, and Rule 19 of the Supreme Court Rules, to review by writ of certiorari the judgment of the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Whether the statute of limitations upon criminal tax prosecutions contained in Title 26 U. S. C. §6531 is suspended where no detriment to, or interference with, the tax investigation results from the physical absence of a taxpayer from the United States.

2. Whether Title 26 U. S. C. §6531, as interpreted and applied by the Courts below so as to suspend the running of the statute of limitations therein contained when a taxpayer is physically "outside the United States" without more, is violative of the due process clause of the Fifth Amendment to the Constitution.

3. Whether the conditions under which the jury deliberated deprived the petitioner of this constitional right to a fair trial.

4. Whether the failure of trial counsel to object to the continued deliberations by the jury during the blackout, precludes petitioner from raising that ground before this court.

D. Constitutional Provisions, Statutes and Rules

The constitutional provisions, statutes and rules involved are:

1. Amendment V, United States Constitution
2. Amendment VI, United States Constitution
3. Section 6531; Title 26, United States Code
4. Rule 52(b), Federal Rules of Criminal Procedure

All of the foregoing are set forth in Appendix B, annexed to this Petition.

E. Statement

A one count indictment was filed charging petitioner with a violation of Section 7201, Title 26, United States Code, for the calendar year 1956. After a sixteen-day jury trial, petitioner was found guilty on November 9, 1965. On December 22, 1965 petitioner was sentenced to imprisonment for four years. On January 3, 1967 petitioner was reduced to imprisonment for a term of three years.

Petitioner filed his federal income tax return for the year 1956 on February 5, 1957. The six year period of limitations commenced to run from the last date upon which the 1956 return was due, to wit, April 15, 1957, and the six years terminated as of April 15, 1963. The Government filed the indictment below, charging the appellant with income tax evasion with respect to this 1956 return, on August 8, 1963, or some 115 days subsequent to April 15, 1963 (26).*

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* References are to pages of the appendix herein.

While the evidence adduced by the Government established that the petitioner was physically outside the territorial limits of the United States for a period in excess of 115 days during 1957, the Government offered no evidence with respect to the effect of such absence upon any examination or investigation by the Internal Revenue Service during his absence nor did the Government present any evidence as to the reason or purpose for such absence. It is also clear that the tax investigation out of which the indictment resulted did not commence until long after the final day of the 115 days of petitioner's absence proved by the Government.

The Government's case against the petitioner cannot stand, therefore, unless mere physical absence from the United States during the six year period of limitations, no matter how bona fide or innocuous, suspends the running of the statute of limitations, even though it is clear that such absence had no conceivable effect of any nature whatever upon the Government's tax investigation.

On the last day of trial herein, November 9, 1965, the jury heard final defense testimony, summations of both counsel, lunched about 1:00 p.m. and were instructed by the Court. At 5:10 p.m. the jury retired to begin deliberations and at 5:28 p.m. there was a complete power failure in the court house as well as over most of New York City and the northeast (28). From 5:28 p.m. until approximately 4:00 a.m. on November 10, 1965 when power was restored, or some ten and one-half hours, the jury sat in darkness, and attempted to consider the issues presented in this case, the trial of which had lasted for sixteen days. Approximately 15 minutes later, at 4:15 a.m., the jury returned a verdict of guilty (29).

At about 10:00 p.m. presiding Judge Tenney had attempted to arrange transportation for the jury to retire for the night to the Hotel Manhattan. However, at approximately 10:45 p.m., when the jurors were asked whether they wished to go to the hotel, after consideraiton they decided due to the fact that one member of the jury had a heart condition and the jury room was on the 13th floor of the Court house and the hotel rooms were on the 11th floor of the Manhattan Hotel, they would decline the offer. No elevators were operating in either building. The jury remained in darkness thereafter until 4:00 a.m., as aforesaid.

REASONS FOR GRANTING THE WRIT

I

The construction by the Courts below that Title 26, United States Code, Section 6531 suspends the statute of limitations upon criminal tax prosecutions if, and for as long as, a taxpayer is physically outside the United States, without more, is erroneous because it is not consonant with the manifest congressional purpose behind the statute.

The construction and application of the suspension provision of the statute of limitations upon criminal tax prosecutions (26 U. S. C. §6531) by the Courts below is not consistent with the rational congressional purpose behind the statute, and produces unjust and absurd results violative of the manifest general purpose behind criminal statutes of limitations. The interpretation below, moreover, conflicts with the approach of several Courts including the Court of Appeals for the Fourth Circuit, in applying the predecessor statute of limitations contained in the 1939 Code, which conflict was not resolved by the 1954

Code now contained in 26 U. S. C. §6531. This confusion can entirely and finally be eliminated by this Honorable Court if this petition is granted, with the desirable result that the primary purpose of definiteness of application, which underlies the statute of limitations itself, may be hereafter fulfilled in all respects. Finally, petitioner respectfully submits that if the interpretation and application of the statute of limitations by the Courts below is correct, this petition should be granted for the compelling reason that, thus construed and applied, the statute violates the due process clause of the Fifth Amendment (See Point II, *infra*).

The opinion of the District Court herein, which was affirmed and adopted without qualification by the Court of Appeals, was that the statute of limitations contained in Title 26, United States Code, Section 6531 is suspended wherever, and for as long as, a taxpayer is physically absent from the United States:

> "irrespective of the reasons for his non-presence; irrespective of whether his non-presence impeded the investigation; and irrespective of whether his non-presence was sporadic or more permanent."

The only evidence presented below by the Government with regard to the Statute of Limitations, was that petitioner was physically present in Canada during 1957 for more than 115 days. The tax investigation relating to petitioner for the year in question did not commence until 1959. No proof was adduced below of any effect upon, or detriment to, the tax investigation by reason of the proven absence of petitioner from the United States, or tending to show that petitioner was a fugitive.

The 1954 Code changed the suspension of the statute of limitations provision of predecessor section of the 1939

Code [Section 3748(a)] in two respects. First, it added the concept of suspension of the statute when the taxpayer is a "fugitive from justice within the meaning of 18 U. S. C. 3290". Second, it changed the application of the suspension provision from where the taxpayer is "absent from the district wherein the offense is committed" to where the taxpayer is "outside the United States."

The latter concept of "absence from the district" contained in Section 3748 of the 1939 Code was itself the subject of conflicting decisions regarding its application. In one line of cases the Courts refused to apply the suspension provision literally so as to suspend the running of the statute based solely upon a taxpayer's physical absence from the District.* On the other hand, several Courts did apply the statutory language literally, holding that the statute is suspended solely upon the basis of the physical absence of the taxpayer from the district wherein the offense was committed.**

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* See *United States* v. *Eliopoulos*, 45 F. Supp. 777, 781 (D. C. N. J. 1942); *United States* v. *Gross*, 159 F. Supp. 316 (D. Nev. 1958); *United States* v. *Beard*, 118 F. Supp. 297 (D. Md. 1954); *United States* v. *Montgomery*, 158 F. Supp. 267 (E. D. Pa. 158); *United States* v. *Goodman*, 178 F. Supp. 338, 343 (D. C. Va. 1959), *rev'd on other gds.*, 289 F. 2d 256 (4th Cir. 1961); *United States* v. *Jurzykowski*, 159 F. Supp. 7 (N. D. N. Y. 1957) and the unreported decision in *United States* v. *Altruda*, No. C 143-52 (S. D. N. Y. 1953) *rev'd on other gds.*, 224 F. 2d 935 (2d Cir. 1955).

** See *United States* v. *Frankel*, 26 A. F. T. R. 1114 (S. D. N. Y. 1939); *United States* v. *Patentore*, 81 F. Supp. 1000 (S. D. N. Y. 1945); *United States* v. *Satz*, 109 F. Supp. 94 (N. D. N. Y. 1952); *United States* v. *Hershenson*, 131 F. Supp. 782 (S. D. N. Y. 1955); *United States* v. *Greenfield*, 131 F. Supp. 843 (E. D. N. Y. 1955); *United States* v. *Udell*, 109 F. Supp. 96 (D. Del. 1952); *United States* v. *Foster*, 197 F. Supp. 387, 394-6 (D. Md. 1961), *rev'd on other gds.*, 309 F. 2d 8 (4th Cir. 1962); *United States* v. *Mathis*, 28 F. Supp. 582 (D. C. N. J. 1939); and *United States* v. *Anthracite Brewing Company*, 11 F. Supp. 1019 (N. D. Pa. 1935).

Given such conflicting decisions as to whether or not the statute should be interpreted literally, the chaotic state of the law under this portion of Section 3748 of the 1939 Code could only be described as an "olla-podrida". *United States* v. *Gross, supra.* A leading commentator in the field has summarized that state of the law as follows:

> "The circumstances under which absence from the jurisdiction under the 1939 Code tolled the running of the statute was subject to somewhat conflicting opinions. The test seemed to be whether the absence interfered in some manner with the ordinary method of finding an indictment or constituted an interference to the execution of process." 10 Mertens, "Law of Federal Income Taxation", §55A, 15, P. 75, fn. 2.

In view of the surprising absence of legislative history upon this issue behind the enactment of Section 6531 of the 1954 Code, petitioner respectfully submits that the above described confusion of the Courts has not at all been put to rest by the change wrought by that section. The addition contained therein of the concept of suspension of the statute where the taxpayer is a fugitive and the limitation of suspension to where the taxpayer is "outside the United States" instead of "absent from the district" does not settle the issue presented herein, namely, whether *physical* absence, without more, is sufficient to toll the statute. Petitioner respectfully submits that the case at bar presents the appropriate vehicle whereby this Honorable Court may, and should, finally settle the confusion presented by the foregoing authorities which, in principle as well as in direct application, persist under the "outside the United States" language of the present code, 26 U. S. C. §6531.

The correct interpretation of 26 U. S. C. §6531, it is respectfully submitted, is that the physical absence of a taxpayer from the United States cannot suspend the statute if it had no adverse effect whatsoever upon the Government's tax investigation. This is precisely the interpretation by commentators of the conflicting cases under 1939 Code (see 10 Mertens, *supra,* §55A. 15, P. 75, fn. 2), and of Professor J. Carrigan, in 11 Tax Law Review at P. 155 (1958):

> "It must be conceded that the 1954 Code has taken the first bold step toward providing equal protection against stale prosecutions for tax crimes. The precise length of that first step must await judicial measurement. It may be assumed that the status 'fugitive from justice' will retain for future tax cases its well established judicial definition requiring intent and flight or concealment. However, no meaning may be assumed for the newly-coined half of the tolling proviso, *for Congress has fallen far short of achieving clarity of expression by substituting the broad but indefinite phrase 'outside the United States' for the unfortunate 'absent from the district'.* It is hoped that courts will credit the general Congressional intent to liberalize the tolling proviso by construing 'outside the United States' to suspend the statute only against one outside the reach of federal process and *only during absences extended enough to interfere with the Government's normal procedures.*"

It must be noted, in this regard, that an apparent conflict exists between the interpretation of Section 3748 (a) of the 1939 Code by the Court of Appeals for the Fourth Circuit in *United States* v. *Goodman, supra,* 289 F. 2d at 262, and that of 26 U. S. C. §6531 by the Court of Appeals

for the Second Circuit below, which, as aforesaid, has not been settled by §6531 of the 1954 Code.

The interpretation urged herein by petitioner is consonant with the rationale and supervening Congressional purpose behind such a statute. Prof. J. Carrigan succinctly stated this purpose as follows:

> "Purposes served by criminal statutes of limitations are several and diverse. Most obvious, and probably most important, is their function of shielding the innocent from conviction long after witnesses and proofs necessary to their defense have disappeared. Even where evidence is neither lost nor destroyed, the erosive force of time undermines its reliability and weakens its persuasive power. Public policy favors prompt enforcement of criminal sanctions to deny the lawbreaker even a temporary profit from his crime, and it is claimed that limitations statutes implement this policy by keeping law enforcement officers current in their work. Furthermore, it is thought that they act as checks on prosecutors to prevent the waste of public funds on frivolous, capricious, or vexations actions brought upon proof so time worn as to render conviction unlikely.
>
> "From earliest times, the United States has consented to time limitations on its right to prosecute those who violate federal law, but since 1790 every statute of limitations of general application to federal crimes has contained a tolling provision excepting from the statutory protection persons 'fleeing from justice.' The apparent rationale behind the tolling proviso was that one who fled the jurisdiction or *concealed himself to hinder inves-*

tigation or escape prosecution should not be entitled to the special amnesty granted by the limitations statutes." 11 Tax L. Rev., at (137-138) (Emphasis supplied).

The decisions below in the case at bar are not consonant with this clear policy behind the statute of limitations or its traditional exception. If there is no causal connection whatsoever between absence from the jurisdiction and any detriment or hindrance to the tax investigation, there exists absolutely no rational purpose, grounded in policy or otherwise, for suspending the running of the statute.

The Government argued below that such a construction is impermissible since Section 6531 of the 1954 Code now suspends the statute where the taxpayer is "a fugitive from justice" and thus there would be no purpose to the phrase "outside the United States" as construed by petitioner. This contention obscures the issue and totally fails to take account of the fact that the concept of "fugitive" is well defined and constitutes a narrower and distinct concept than the construction of the phrase "outside the United States" which petitioner urges. As the District Court below pointed out, a "fugutive" is defined as one who flees "with the intention of avoiding being brought to justice for a particular offense * * * ". *Streep* v. *United States,* 160 U. S. 128, 133 (1895). A person may not be a "fugitive" under this test, but still may prejudice the Government by detrimenting, impeding, hindering or delaying the tax investigation because of his absence from the United States, irrespective of his intent.

The construction we urge provides a clearer rationale than that of the Courts below for the "outside the United States" portion of §6531, as covering, as we have demonstrated, a class of taxpayers not at all embraced within

the term "fugitive". This construction does not place upon the Government any substantial or "obvious burden of proving the nature or purport of the defendant's stay while outside the jurisdiction" as the Government argued below. Our contention is that Congress intended that there must be a causal connection between some detriment to the Government in its tax investigation and the taxpayer's absence from the United States. In practice, the proper application of the tolling provision in question would be invoked upon proof by the Government that some detriment to its investigation was, in fact, caused by the absence of the taxpayer from the United States, such as any attempt by the Internal Revenue Service or the Deparement of Justice to summon or even to informally contact the taxpayer during his absence from the United States. The Statute would then be tolled until the taxpayer's return. It will readily be observed that virtually no burden is placed upon the Government as a result of the construction we urge, inasmuch as it will readily have such requisite proof of detriment in its own files.

The interpretation of the statute which petitioner now urges is therefore more logical and rational than that adopted below, and is also consistent with the prior decision of this Court that statutes of limitation should be construed liberally in favor of the accused. *United States* v. *McElvain,* 272 U. S. 633 (1926). Exceptions thereto must therefore be narrowly construed. *United States* v. *Scharton,* 285 U. S. 518 (1932).

Finally, the construction of the statute below necessarily results in lengthy and indeterminate extensions of the statue of limitations, which, being at variance with the very purpose thereof, are not favored. *Grunewald* v. *United States* 353 U. S. 391, 401 (1951); *Krulewitch* v. *United States,* 336 U. S. 440, 455-6 (1949).

II

Title 26, United States Code, Section 6531, as interpreted below so as to provide for the tolling of the statute of limitations upon criminal tax prosecutions if a taxpayer is physically absent from the United States without more, violates the due process clause of the Fifth Amendment.

If the construction of §6531 by the Courts below is correct, petitioner respectfully submits that total absence of the requisite rationale relationship between the mere absence of taxpayers from the United States and the purpose behind the criminal statute of limitations renders the statute flagrantly arbitrary and discriminatory against those taxpayers who travel, thereby violating the Due Process Clause of the Fifth Amendment.

Although the Fifth Amendment contains no Equal Protection Clause, it does forbid discrimination so unjustifiable as to constitute a violation of due process of law. *Schneider* v. *Rusk,* 377 U. S. 163, 169 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954); *Taylor* v. *United States,* 320 F. 2d 843 (9th Cir. 1963), *cert. denied,* 376 U. S. 916 (1964).

The construction of the statute adopted by the Courts below necessarily subjects those taxpayers who travel outside the United States for any purpose, whether for business or pleasure, *bona fide,* or not to a statute of limitations upon tax prosections lengthened by the time they are abroad, *and for that reason alone.* Thus taxpayers who travel abroad are subjected to a longer statute of limitations, varying with the length of time spent outside the United States, than those who remain within the confines of the United States, totally irrespective of whether the

tax investigation is prejudiced thereby. A more arbitrary discrimination is difficult to imagine, and this Court has already invalidated a statute which involved a similar classification. See *Schneider* v. *Rusk, supra,* 377 U. S. at 169.

A statute of limitations is not a matter of legislative grace, but is a substantive right. *United States* v. *Auto Rental Company, Inc.,* 187 F. Supp. 603 (W. D. Pa. 1960); *United States* v. *Haramic,* 125 F. Supp. 128 (W. D. Pa. 1954). Unlike the statute of limitations in a civil case, it creates a bar to prosecution, *Chaifetz* v. *United States,* 288 F. 2d 133 (App. D. C. 1960), *rev'd in part* 366 U. S. 209, *reh. den.* 366 U. S. 955 (1961); *Benes* v. *United States,* 276 F. 2d 99 (6th Cir. 1960). It is a limitation upon the power of the sovereign to act against the accused. *Waters* v. *United States,* 328 F. 2d 739 (10th Cir. 1964), and is consonant with a policy of repose that is fundamental to our society, and our criminal law. *Bridges* v. *United States,* 346 U. S. 209 (1953).

If mere absence from the United States, without a showing of detriment to the tax investigation, is held sufficient to satisfy the suspension portion of §6531, the resulting arbitrary classification, in effect, penalizes those taxpayers who travel, and deprives them of their substantive right to the protection of the statute of limitations as long as their travel continues. This discrimination is not only essentially arbitrary, but its very basis is invalid, since the right to travel is an inalienable and fundamental right of every citizen. *Kent* v. *Dulles,* 357 U. S. 117, 125-7 (1958).

If Section 6531 cannot be logically and fairly construed in the manner set forth in Point I, *supra,* so as to rationally effectuate the manifest intent of Congress, petitioner respectfully submits that it is violative of the Due Process Clause of the Fifth Amendment.

III

The petitioner was deprived of a fair trial because the jury was unable to deliberate the guilt or innocence of the defendant in a free, untrammeled and unaffected manner.

The jury, in the instant case, was confronted with such monumental physical and mental discomfort that it was impossible for them to deliberate fairly and intelligently about the guilt or innocence of the petitioner.

On the last day of trial, November 9, 1965, at 5:10 p.m. the jury retired to begin deliberations (28). At 5:28 p.m. there was a complete electric power failure in the court house as well as over most of New York City and the northeastern portion of the United States (28). From 5:28 p.m. until approximately 4:00 a.m. on November 10, 1965, some ten and one-half hours, the jury sat in darkness, presumably unable to properly examine the numerous exhibits offered at trial, or discuss and consider the issues in the case in a normal, anxiety-free environment.

Finally, at about about 4:00 a.m. on November 10, 1965, power was restored in the court house and at 4:15 a.m., just fifteen minutes thereafter, the jury found the petitioner guilty. No doubt, they were all happy and relieved at being able to have terminated their ordeal and return to their homes.

This Honorable Court has never permitted any element of coercion to play any part in the verdict of a jury. If it finds that a ten and one-half hour "blackout" *could have* sufficiently disturbed the calm equilibrium of the members of the panel, then the instant petition should be granted.

It is not necessary that petitioner specify with particularity the manner in which he was prejudiced. As this

Court has stated: "* * * [A]t times a procedure employed * * * involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *United States,* 381 U. S. 532, 542-543 (1964) "* * * [O]ur system of law has always endeavored to prevent even the *probability* of unfairness." * * * [T]o perform its high function in the best way, 'justice must satisfy the appearance of justice' *Offutt* v. *United States,* 348 U. S. 11, 14." *In re Murchison,* 349 U. S. 133, 136 (1955) (Emphasis supplied). The undisputed circumstances in this case under which the jury deliberated clearly demonstrate that petitioner did not have a fair and just trial before a fair and impartial jury as guaranteed by the Fifth and Sixth Amendments, in that, the circumstances were so inherently anxiety provoking and diverting that only an extraordinary man could be expected to retain even a small measure of objectivity with which to weigh petitioner's fate. This is truly a situation where prejudice to the accused may be presumed. See *Estes* v. *United States, supra,* and *In re Murchison, supra.*

The Court below held that: "Moreover, appellant's attorney both consented during the trial to the jury's continued deliberations in spite of the blackout and failed to object at the end of the trial even though the trial judge invited comment when he read a summary of the night's events into the record" (21, 22). Rule 52(b), Federal Rules of Criminal Procedure, however, provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Although held to be a discretionary power, *On Lee* v. *United States,* 343 U. S. 747, 750 (1952), it has been frequently exercised as an "inherent power" of this Court "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation

of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936).

Rule 52(b) contemplates a class of "plain error"—error so fundamental that the appellate court will reverse because of it—even though it was not objected to below, and, further, if the error is of such a character that its natural effect is to prejudice petitioner's substantial rights, the burden of sustaining the verdict rests upon the prosecution. *Kotteakos* v. *United States,* 328 U. S. 750, 760 (1946). "A choice made by counsel not participated in by the [defendant] * * * does not automatically bar relief * * * " *Fay* v. *Noia,* 372 U. S. 391 (1963). Mr. Justice Frankfurter's separate opinion in *Brown* v. *Allen,* 344 U. S. 433 (1953) stated that: " * * * rights under the Federal Constitution may be waived at the trial." "However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding * * * " (citations omitted) (p. 503).

If this Court finds that petitioner's right to a jury, free from external causes and influences which would *tend* to disturb the full and untrammeled exercise of its judgment was violated, then it must conclude that such disturbance goes to the very foundation of our judicial system and was not "waived."

CONCLUSION

For the reasons hereinabove set forth, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP J. RYAN,
Attorney for Petitioner.

MORTON L. GINSBERG,
Of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84—September Term, 1966.

(Argued October 25, 1966 Decided November 16, 1966.)

Docket No. 30427

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL MYERSON, a/k/a MEYER MEYERSOHN,

Appellant.

Before:

LUMBARD, *Chief Judge,*

MOORE and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of conviction for violation of 26 U. S. C. §7201 (wilful evasion of federal income tax) entered by the United States District Court for the Southern District of New York after a trial before Hon. Charles H. Tenney and a jury. Affirmed.

PHILIP J. RYAN, New York, New York (Ryan, Temkin & Ginsberg, New York, New York, on the brief), *for appellant.*

Appendix A

CHARLES P. SIFTON, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, New York, Daniel R. Murdock and Michael W. Mitchell, Assistant United States Attorneys, on the brief), *for appellee.*

PER CURIAM:

Appellant was convicted on a one-count indictment of fraudulent evading and defeating a large part of the federal income tax due and owing by him and his wife for the calendar year 1956, in violation of 26 U. S. C. §7201. Upon the trial, the government introduced substantial evidence as to appellant's guilt and appellant raises no question here as to its sufficiency. Instead, appellant urges three assignments of error: (1) the six-year statute of limitations had run prior to the return of the indictment; (2) the jury's deliberations were infected by the physical and emotional strain imposed on its members by an electric power failure causing a city-wide blackout of substantial duration; and (3) the trial court erred in failing to compel the prosecution to turn over to the defense certain "witness sheets."

Appellant filed his income tax return on February 5, 1957. The six-year period of limitations for the wilful evasion of tax, established by 26 U. S. C. §6531(2), commenced to run from the last date upon which the 1956 return was due, to wit, April 15, 1957.[1] The indictment was

[1] Appellant argued below, but does not argue here, that the statute of limitations should begin to run from the day he actually filed his return (i.e., February 5, 1957) rather than from the last due day for 1956 returns. We agree with the district court's conclusion that the choice of the last due date is compelled by the statute. See 28 U. S. C. §§6531, 6513.

returned on August 8, 1963, some 115 days after the expiration of six years. Section 6531 of 26 U. S. C., however, provides for a tolling of the limitations statute whenever a person committing an offense under the internal revenue laws "is outside the United States or is a fugitive from justice." It was established at trial that appellant had been "outside the United States" in excess of 115 days during the relevant period. Appellant argues that the section was not intended to apply to periods spent "outside the United States" unless the circumstances indicated flight, a substantial impediment to the investigation and enforcement of the internal revenue laws, an evasion of legal process or, at least, a change of residence. We disagree. The statute is unambiguous on its face and clearly covers appellant's absences. There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country. Appellant's claim that the statute, if applied to ordinary business or pleasure trips, is unconstitutional is without merit.

We also reject appellant's contention that the jury was unable to deliberate fairly or intelligently due to the physical and mental discomfort caused by the fact that shortly after the jury retired the lights went out as a result of the general Northeast blackout of November 9, 1965. The record discloses that the jury was adequately provided for in that its members were permitted to make one phone call each in the presence of a marshal, were offered hotel accommodations (which were turned down on account of the substantial descending and climbing of stairs that would have been involved), and were provided with sandwiches and hot coffee. Moreover, appellant's attorney both consented during the trial to the jury's continued deliberations in spite of the blackout and failed to object at the end of

the trial even though the trial judge invited comment when he read a summary of the night's events into the record.

Appellant's last point is that he was entitled to possession of certain "witness sheets." At the trial, a government witness testified on cross-examination that prior to taking the stand he had looked at some twenty pages of "witness sheets"—papers prepared by the government containing the witness's anticipated testimony. Appellant contends that these witness sheets embodied a "statement" by the witness within the meaning of 18 U. S. C. §3500 and thus should have been turned over to appellant's attorney on demand. We hold that the contested witness sheets are not §3500 material as they are neither a "statement made by . . . and signed or otherwise adopted or approved" by the witness, 18 U. S. C. §3500(e)(1), nor a "substantial verbatim recital of an oral statement" made by the witness. 18 U. S. C. §3500(e)(2).

Affirmed.

APPENDIX B

Constitutional Provisions

Amendment V, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statute Involved

Section 6531, Title 26, United States Code:

§6531, Periods of Limitation on Criminal Prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal

revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years——

• • •

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

• • •

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. . . . Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the Commissioner of the United States . . . Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat 815.

Rule Involved

Rule 52, Federal Rules of Criminal Procedure

"RULE 52. HARMLESS ERROR AND PLAIN ERROR

• • •

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPENDIX C

Judgment of Affirmance by United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL MYERSON, a/k/a MEYER MEYERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

Excerpts From Rulings of Trial Court Prior to Trial

• • •

(3)

Insofar as the tolling of the Statute of Limitations is concerned, the Court rules that the statute is tolled if the defendant is either a fugitive from justice, which could take place within the United States, or if the defendant is outside of the United States, irrespective of his intent; in other words, whether he is on a business trip or whether these are periodic absences for a bona fide reason, and the statute is tolled irrespective of whether it be shown that the defendant's absence impeded the investigation.

• • •

Excerpts From Charge of the Trial Court

(353)

Now, in the case before us the six-year statute of limitations began to run on April 16, 1957 and would have run out on April 16, 1963. The indictment was filed on August 8, 1963, which is six years and 115 days from the time the statute began to run and 115 days beyond the six-year period.

However, the Code further provides that

(354)

the statute of limitations is tolled for the period that the taxpayer is outside of the United States, that is, the statute stops running for the period that the taxpayer is outside the United States and begins to run again when he is within its geographical confines again.

Appendix D

Thus, the government must show that the taxpayer was outside of the United States for no less than 115 days, in other words, that the statute of limitations stopped running for those days, in order to justify instituting the prosecution six years and 115 days from the date that the statute began to run.

Now you need not make a specific finding as to the precise total number of days during which the defendant was outside of the United States, nor need you all agree on the exact number, except that to return a verdict of guilty in this case you must all agree unanimously that the defendant was outside the United States for no less than 115 days between April 16, 1957 and August 8, 1963.

Now, the intent of the taxpayer in being outside the United States is not relevant, nor is the duration of each sojourn, nor is it relevant whether or not it is impeding any investigation,

(355)

but the government must prove beyond a reasonable doubt the objective fact of being outside the United States, and you total up the amount of days that the government has so proved.

• • •

Objection to Charge

(395)

Mr. Hollman: Your Honor, the defendant considers it to be a very fair charge. The only point, of course, is for the appellate record and would be on the question of the intent to evade or hinder an investigation when he was outside the country during the statute of limitations, but aside from that we have no objection.

Appendix D

(396)

The Court: That, of course, is contained in my ruling which I made earlier that his intent in being absent and whether or not it affected any investigation was not relevant.

• • •

Proceedings During Jury Deliberations

(399)

(At 5:10 o'clock p.m. the jury retired to the juryroom to commence deliberations.)

• • •

(414)

(At 4:10 o'clock a.m. note received from the jury.)
(The following took place in the robing room:)

The Court: Well, I think its appropriate

(415)

that we dictate something on the record about the occurrences this evening, and if there is anything that you want to add or correct or suggest, or whatever you think, note it down.

The lights went out in the court house and throughout the City at 5:28, shortly after the jury had retired to deliberate and after they had requested that certain exhibits be sent in to them, as evidenced by the written requests which they sent out.

When it appeared that the blackout would continue for some time, arrangements were made, a room secured at the Hotel Manhattan, and also arrangements made to transport the jurors in the prison van to the hotel.

However, at approximately 10:45, when the jurors were asked whether they wished to go to the hotel, after consideration they declined due to the fact that one member of the jury had a heart condition and the jury room was on the 13th floor of the court house and the hotel rooms were on the 11th floor of the Manhattan Hotel and arrangements were thereafter made to secure food and sandwiches and hot coffee for the jurors, and after that, with the consent of counsel

(416)

and at the suggestion of the jury they resumed their deliberations and certain exhibits, agreed upon by counsel, were sent into the juryroom and a record made of the exhibits so submitted to them.

I believe that the subsequent events have all been recorded by the reporter.

Is there anything that either one of you gentlemen would care to add?

I might say that I understand the jurors were permitted to make telephone calls one at a time in the presence of the marshal.

• • •

(417)

The Court: Very well. If you can do that with the agents and with Mr. Hollman, we will have a brief recess.

I should say for the record that I have just received the following note from the jury at approximately 4:15 a.m.:

"We the jury have reached a verdict."

• • •

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1065

MICHAEL MYERSON, A/K/A MEYER MYERSOHN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a trial by jury in the United States District Court for the Southern District of New York on a one-count indictment charging him with wilful tax evasion for the 1956 tax year. The proof at his trial showed that he had received $275,162.32 of adjusted gross income during 1956, resulting in taxable income of $271,762.32 and an income-tax liability of $198,508.46 (G.A. 139b, 149b–150b).[1] On his return for that year petitioner declared taxable income of $62,699.52 and a tax of $28,113.70. His sentence, as reduced in January 1967,

[1] "G.A." refers to the Government's Appendix in the court below.

was three years' imprisonment. The court of appeals affirmed the conviction *per curiam*. 368 F. 2d 393. The judgment of the court of appeals was entered on November 16, 1966 (Pet. 2, 25). The petition for a writ of certiorari was filed on February 14, 1967, well after the expiration of the 30-day period prescribed by Rule 22(2) of the Revised Rules of this Court, and it is, therefore, untimely. In any event, there is no occasion for further review by this Court.

1. There is no merit to petitioner's contention that his indictment was returned after the limitations period had expired. Section 6531 of the Code provides a six-year limitations period but prescribes that the time during which the defendant "is outside the United States or is a fugitive from justice" shall "not be taken as any part of the time limited by law for the commencement of such proceedings" (Pet. 24). Petitioner was indicted on August 8, 1963, which was 115 days after April 15, 1963—the date on which the statute of limitations would have run if no exception had been applicable. It was shown, however, that petitioner had been in Canada for more than 115 days during the six-year period (G.A. 128b–129b), and the jury was instructed to return a verdict of not guilty unless it found that petitioner had been outside the United States for more than this time. The jury's verdict indicated that it found that the statute had been tolled, and that the indictment was not barred by the statute.

Section 6531 of the 1954 Code was intended to do away with the uncertainties surrounding its predeces-

sor, Section 3748(a) of the 1939 Code, which gave rise to substantial litigation. The present provision is clear-cut and provides an easily administered limitations provision. See *United States* v. *Foster,* 197 F. Supp. 387, 394 (D. Md.), reversed on other grounds, 309 F. 2d 8 (C.A. 4). It was reasonable for Congress to relieve the prosecution of the burden of proving in such cases the purpose of the taxpayer's stay in a foreign country.

2. Nor is there substance to petitioner's claim (Pet. 15–17) that he may have been prejudiced by the circumstances under which the jury deliberated—during the famous "black-out" of electrical power which afflicted the northeastern part of the country on November 9, 1965, the last day of the trial. That contention was plainly waived at trial. Before the verdict was returned, the trial court summarized the relevant events for the record in the presence of counsel. He stated that "with the consent of counsel and at the suggestion of the jury they resumed their deliberations [at approximately 10:45 p.m.] and certain exhibits, agreed upon by counsel, were sent to the jury room * * *" (G.A. 154b). Although the court asked petitioner's attorney whether he had anything to "add or correct or suggest" (G.A. 153b), defense counsel neither objected to the court's reference to his consent nor made any additional statement.

Moreover, petitioner's argument is premised upon the erroneous assumption that there was no auxiliary source of light available and that the deliberations were conducted in utter darkness. It is obvious from the fact that the jurors wrote three notes to the court

after the black-out began (G.A. 153b), and from the court's recitation that they were furnished with certain exhibits, that there was sufficient light by which to read and write. Indeed, it is clear from the judge's statement that the jury was given the option of suspending its deliberations and that it chose instead to continue. In these circumstances there is no reason to believe that the jurors were unable to render a fair verdict.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967